IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

APPEAL FROM ORDER NO.1028 OF 2002

1. Jagdish Tukaram Mulik
2. Master Yogesh Tukaram Mulik
3. Master Vishal Tukaram Mulik
Appellant Nos.2 and 3 minors
through next friend, their elder
brother the Appellant No.1
All r/o. Survey No.13, Wadgaon
Sheri, Pune - 411 014 ... Appellants

V/s.

1. Sukumar Estates Limited
having its registered office
at Kumar Capital, 2nd floor,
2413 East Street Camp
Pune - 411 001

2. Shri Vimalkumar Kesrimal Jain

3. Shri Kevalkumar Kesrimal Jain

4. Shri Inderkumar Kesrimal Jain

5. Shri Lalitkumar Kesrimal Jain
Respondent Nos.2 to 5 working
for gain at Kumar Capital,
2nd floor, 2413, East Street
Camp, Pune - 411 014

6. Shri Tukaram Sopan Mulik
Survey No.13, Wadgaon Sheri
Pune - 411014

7. Shri Chandrakant Haribhu Tingare
Dhanori Gaothan, Tal.: Haveli
Dist.: Pune

8. Shri Manohar Haribhau Tingare
Dhanori Gaothan, Tal.: Haveli
Dist.: Pune

9. Shri Prabhakar Haribhau Tingare
Dhanori Gaothan, Tal.: Haveli
Dist.: Pune

10. Shri Ramakant Haribhau Tingare
Dhanori, S.No.67/B, Harikrishna

Park, Pune

11. Shri Ashok Haribhau Tingare
r/a 1/69/70 Petit Mill Compound
4th floor, Tardeo Police Station
Building, Mumabi - 400 034

12. Shri Balchandra Haribhau
Tingare, 264/A, Timber Market
Bhavani Peth, JaiVijay Apartments,
Pune.

13. Sou.Kamalabai Dnyaneshwar
Yelwande, r/a Chowswadi, Charholi
Road, Taluka Haveli, Dist.:Pune

14. Shri Eknath Shankarrao Tupe
r/a Hadapsar Magarpatta Pasodi
Wasti, Survey No.158, Pune

15. Shri Mohan Shankarrao Tupe
Hadapsar Magarpatta, Pasodi
Wasti, Survey No.158, Pune

16. Sou.Sindhubai Keshavrao Satav
r/a Wagholi Tal.:Haveli
Dist.:Pune Lohagaon Vlagholi
Road, Near Jakat Naka, Pune

17. Sou. Indubai Ekanath Jagdale
r/a 31/424 Netaji Nagar, Wanawadi
Pune

18. Smt.Shobha Suryakant Khandawe
r/a Lahagaon, Tal.: Haveli
Dist.: Pune, Near Sant Tukaram
Mandir, Pune

19. Shri Chandrakant Ganpatrao
Khandave, r/a Lahagaon,
Tal.:Haveli, Dist.: Pune
Near Sant Tukaram Mandir, Pune

20. Smt.Leelabai Dnyaneshwar
Kurhade, r/a House No.882,
Alandi Devachi, Tal.: Khed, Pune ... Respondents

a/w

WRIT PETITION NO.154 OF 2003

1. Jagdish Tukaram Mulik

2. Master Yogesh Tukaram Mulik

3. Master Vishal Tukaram Mulik
Appellant Nos.2 and 3 minors
through next friend, their elder
brother the Appellant No.1
All r/o. Survey No.13, Wadgaon
Sheri, Pune - 411 014 ... Appellants

V/s.

1. Sukumar Estates Limited
having its registered office
at Kumar Capital, 2nd floor,
2413 East Street Camp
Pune - 411 001

2. Shri Vimalkumar Kesrimal Jain

3. Shri Kevalkumar Kesrimal Jain

4. Shri Inderkumar Kesrimal Jain

5. Shri Lalitkumar Kesrimal Jain
Respondent Nos.2 to 5 working
for gain at Kumar Capital,
2nd floor, 2413, East Street
Camp, Pune - 411 014

6. Shri Tukaram Sopan Mulik
Survey No.13, Wadgaon Sheri
Pune - 411014

7. Shri Chandrakant Haribhu Tingare
Dhanori Gaothan, Tal.: Haveli
Dist.: Pune

8. Shri Manohar Haribhau Tingare
Dhanori Gaothan, Tal.: Haveli
Dist.: Pune

9. Shri Prabhakar Haribhau Tingare
Dhanori Gaothan, Tal.: Haveli
Dist.: Pune

10. Shri Ramakant Haribhau Tingare
Dhanori, S.No.67/B, Harikrishna
Park, Pune

11. Shri Ashok Haribhau Tingare
r/a 1/69/70 Petit Mill Compound
4th floor, Tardeo Police Station
Building, Mumabi - 400 034

12. Shri Balchandra Haribhau

Tingare, 264/A, Timber Market
Bhavani Peth, JaiVijay Apartments,
Pune.

13. Sou.Kamalabai Dnyaneshwar
Yelwande, r/a Chowswadi, Charholi
Road, Taluka Haveli, Dist.:Pune

14. Shri Eknath Shankarrao Tupe
r/a Hadapsar Magarpatta Pasodi
Wasti, Survey No.158, Pune

15. Shri Mohan Shankarrao Tupe
Hadapsar Magarpatta, Pasodi
Wasti, Survey No.158, Pune

16. Sou.Sindhubai Keshavrao Satav
r/a Wagholi Tal.:Haveli
Dist.:Pune Lohagaon Vlagholi
Road, Near Jakat Naka, Pune

17. Sou. Indubai Ekanath Jagdale
r/a 31/424 Netaji Nagar, Wanawadi
Pune

18. Smt.Shobha Suryakant Khandawe
r/a Lahagaon, Tal.: Haveli
Dist.: Pune, Near Sant Tukaram
Mandir, Pune

19. Shri Chandrakant Ganpatrao
Khandave, r/a Lahagaon,
Tal.:Haveli, Dist.: Pune
Near Sant Tukaram Mandir, Pune

20. Smt.Leelabai Dnyaneshwar
Kurhade, r/a House No.882,
Alandi Devachi, Tal.: Khed, Pune ... Respondents

a/w

WRIT PETITION NO.155 OF 2003

1. Jagdish Tukaram Mulik

2. Master Yogesh Tukaram Mulik

3. Master Vishal Tukaram Mulik
Appellant Nos.2 and 3 minors
through next friend, their elder
brother the Appellant No.1
All r/o. Survey No.13, Wadgaon
Sheri, Pune - 411 014 ... Appellants

V/s.

1. Sukumar Estates Limited
having its registered office
at Kumar Capital, 2nd floor,
2413 East Street Camp
Pune - 411 001

2. Shri Vimalkumar Kesrimal Jain

3. Shri Kevalkumar Kesrimal Jain

4. Shri Inderkumar Kesrimal Jain

5. Shri Lalitkumar Kesrimal Jain
Respondent Nos.2 to 5 working
for gain at Kumar Capital,
2nd floor, 2413, East Street
Camp, Pune - 411 014

6. Shri Tukaram Sopan Mulik
Survey No.13, Wadgaon Sheri
Pune - 411014

7. Shri Chandrakant Haribhu Tingare
Dhanori Gaothan, Tal.: Haveli
Dist.: Pune

8. Shri Manohar Haribhau Tingare
Dhanori Gaothan, Tal.: Haveli
Dist.: Pune

9. Shri Prabhakar Haribhau Tingare
Dhanori Gaothan, Tal.: Haveli
Dist.: Pune

10. Shri Ramakant Haribhau Tingare
Dhanori, S.No.67/B, Harikrishna
Park, Pune

11. Shri Ashok Haribhau Tingare
r/a 1/69/70 Petit Mill Compound
4th floor, Tardeo Police Station
Building, Mumabi - 400 034

12. Shri Balchandra Haribhau
Tingare, 264/A, Timber Market
Bhavani Peth, JaiVijay Apartments,
Pune.

13. Sou.Kamalabai Dnyaneshwar
Yelwande, r/a Chowswadi, Charholi
Road, Taluka Haveli, Dist.:Pune

14. Shri Eknath Shankarrao Tupe
r/a Hadapsar Magarpatta Pasodi
Wasti, Survey No.158, Pune

15. Shri Mohan Shankarrao Tupe
Hadapsar Magarpatta, Pasodi
Wasti, Survey No.158, Pune

16. Sou.Sindhubai Keshavrao Satav
r/a Wagholi Tal.:Haveli
Dist.:Pune Lohagaon Vlagholi
Road, Near Jakat Naka, Pune

17. Sou. Indubai Ekanath Jagdale
r/a 31/424 Netaji Nagar, Wanawadi
Pune

18. Smt.Shobha Suryakant Khandawe
r/a Lahagaon, Tal.: Haveli
Dist.: Pune, Near Sant Tukaram
Mandir, Pune

19. Shri Chandrakant Ganpatrao
Khandave, r/a Lahagaon,
Tal.:Haveli, Dist.: Pune
Near Sant Tukaram Mandir, Pune

20. Smt.Leelabai Dnyaneshwar
Kurhade, r/a House No.882,
Alandi Devachi, Tal.: Khed, Pune ... Respondents

AND

WRIT PETITION NO.157 OF 2003

1. Jagdish Tukaram Mulik

2. Master Yogesh Tukaram Mulik

3. Master Vishal Tukaram Mulik
Appellant Nos.2 and 3 minors
through next friend, their elder
brother the Appellant No.1
All r/o. Survey No.13, Wadgaon
Sheri, Pune - 411 014 ... Appellants

V/s.

1. Sukumar Estates Limited
having its registered office
at Kumar Capital, 2nd floor,
2413 East Street Camp
Pune - 411 001

2. Shri Vimalkumar Kesrimal Jain

3. Shri Kevalkumar Kesrimal Jain

4. Shri Inderkumar Kesrimal Jain

5. Shri Lalitkumar Kesrimal Jain
Respondent Nos.2 to 5 working
for gain at Kumar Capital,
2nd floor, 2413, East Street
Camp, Pune - 411 014

6. Shri Tukaram Sopan Mulik
Survey No.13, Wadgaon Sheri
Pune - 411014

7. Shri Chandrakant Haribhu Tingare
Dhanori Gaothan, Tal.: Haveli
Dist.: Pune

8. Shri Manohar Haribhau Tingare
Dhanori Gaothan, Tal.: Haveli
Dist.: Pune

9. Shri Prabhakar Haribhau Tingare
Dhanori Gaothan, Tal.: Haveli
Dist.: Pune

10. Shri Ramakant Haribhau Tingare
Dhanori, S.No.67/B, Harikrishna
Park, Pune

11. Shri Ashok Haribhau Tingare
r/a 1/69/70 Petit Mill Compound
4th floor, Tardeo Police Station
Building, Mumabi - 400 034

12. Shri Balchandra Haribhau
Tingare, 264/A, Timber Market
Bhavani Peth, JaiVijay Apartments,
Pune.

13. Sou.Kamalabai Dnyaneshwar
Yelwande, r/a Chowswadi, Charholi
Road, Taluka Haveli, Dist.:Pune

14. Shri Eknath Shankarrao Tupe
r/a Hadapsar Magarpatta Pasodi
Wasti, Survey No.158, Pune

15. Shri Mohan Shankarrao Tupe
Hadapsar Magarpatta, Pasodi
Wasti, Survey No.158, Pune

16. Sou.Sindhubai Keshavrao Satav
r/a Wagholi Tal.:Haveli
Dist.:Pune Lohagaon Vlagholi
Road, Near Jakat Naka, Pune

17. Sou. Indubai Ekanath Jagdale
r/a 31/424 Netaji Nagar, Wanawadi
Pune

18. Smt.Shobha Suryakant Khandawe
r/a Lahagaon, Tal.: Haveli
Dist.: Pune, Near Sant Tukaram
Mandir, Pune

19. Shri Chandrakant Ganpatrao
Khandave, r/a Lahagaon,
Tal.:Haveli, Dist.: Pune
Near Sant Tukaram Mandir, Pune

20. Smt.Leelabai Dnyaneshwar
Kurhade, r/a House No.882,
Alandi Devachi, Tal.: Khed, Pune ... Respondents

Mr.C.M. Korde with Nitin Jamdar for Appellants/
Petitioners

Mr.V.V. Tulzapurkar with Birendra Saraf & Mrs.Swati
Deshpande i/b M/s.M.S. Bodhanwala & co. for Respondent
Nos.1 to 4

Mr.A.V. Anturkar for Respondent No.5

Mr.Vijay Killedar for Respondent Nos.6, 8 to 11
and 13 to 20

CORAM: **SMT.NISHITA MHATRE, J.**

JUDGMENT RESERVED ON: **DECEMBER 14, 2004**
JUDGMENT DELIVERED ON: **JANUARY 19, 2004**

JUDGMENT:

. The facts involved in the Appeal from Order and the three writ petitions are the same and, the parties to the four proceedings are similar and, therefore, they are being heard together.

2. The Appeal from Order challenges an order of the Civil Judge, Senior Division, Pune in Special Civil Suit No.333 of 2001 passed below the application at Exhibit 5 filed for temporary injunction by the appellants. Writ Petition No.154 of 2003 challenges the order rejecting the application for amendment of plaint. Writ Petition No.155 of 2003 challenges the order rejecting the application for amending Exhibit 5 that is the injunction application. Writ Petition No.157 of 2003 challenges the rejection by the trial Court of the Commissioner's report in respect of the suit property. For the sake of convenience, the appellants and the Petitioners will be referred to as 'the plaintiffs' and the Respondents as 'the defendants'.

3. The short question involved in the present proceedings is whether a property which the plaintiffs have inherited from their grandfather Sopanrao under a will dated 5.11.1986 should be identified as the property mentioned in the schedule to the will of Sopanrao or the property which was actually owned and possessed by Sopanrao when he expired. The identity of the property which the plaintiffs claim is in question. It will have to be determined whether the plaintiffs can be permitted to amend their plaint and consequently the injunction application to claim a different property from the one claimed in the plaint initially, on the

basis of the report of the Commissioner appointed by the Court.

4. One Trimbakrao Mulik owned and possessed some lands at Taluka Vadgaon Sheri. Trimbakrao died on 22.4.1973 leaving behind a will dated 23.8.1959. Undisputedly, Trimbakrao and his son Sopanrao owned 50% share each of lands bearing Survey Nos.13/1+2+3 and Survey No.14. Under the will, Trimbakrao bequeath 2 acres of land, each, to his four daughters Krishnabai, Jijabai, Yashodabai and Leelabai. Defendant Nos.7 to 13, Defendant Nos.14 and 15 and Defendant Nos.16 to 19 are the heirs of Krishnabai, Jijabai and Yashodabai respectively. Leelabai is Defendant No.20. The remaining property owned by Trimbakrao, was willed to Defendant No.6 herein, who is the father of the plaintiffs. Sopanrao expired on 14.2.1984 leaving behind a will dated 5.11.1986 bequeathing his share in the property to his grandchildren that is the plaintiffs herein. The share of Sopanrao in various lands including the Survey Nos.13/1+2+3 and 14 in Vadgaon Sheri Taluka Haveli, District Pune (which are relevant for the present purpose) was willed by Sopanrao to the plaintiffs.

5. The plaintiffs claimed that when they were minors, their father Tukaram sought to sell off part of

the lands which were bequeathed to them by Sopanrao. When the first plaintiff became a major, he filed Special Civil Suit No.3333 of 2001 for himself and on behalf of his two minor brothers seeking an injunction against Defendant Nos.6 to 20 from entering into any transaction with Defendant No.1 in respect of the properties which were mentioned in paragraphs 1(a) and (d) to the plaint. Development agreements had been entered into by Defendant Nos.6 to 20 with Defendant No.1 company for developing their respective properties. The plaintiffs sought to have these agreements declared void and not binding on the plaintiffs in so far as they related to the properties described in paragraphs 1(a) and (d) to the plaint. The plaintiffs also sought an injunction against Defendant Nos.1 to 5 from entering and carrying out any work on the properties mentioned in paragraphs 1(a) and (d) to the plaint.

6. It appears that the development agreement between Defendant No.6 and Defendant No.1 was entered into on 29.4.1991 whereas the agreements between the other Defendant Nos.7 to 20 and defendant No.1 were entered into in the year 1992 in relation to their respective properties. The application for injunction was granted by the trial Court on 30.4.2001. Defendant No.1 challenged this order by filing Appeal from Order No.425 of 2001. By an order dated 29.6.2001, a learned

Single Judge of this Court, directed the trial Court to appoint a Court Commissioner in order to identify the property which was bequeathed to the plaintiffs by Sopanrao. It was further directed that the Commissioner appointed should submit a report regarding the identity of the properties conveyed to Defendant No.1 and properties received by the plaintiffs under the will by referring to the necessary documents such as the revenue record and any other material that was produced on record. By this order, the trial Court was directed to reconsider the application for interim relief after obtaining the Commissioner's report in respect of the identity of the property. The parties were directed to maintain status quo till then. An observation has also been made that since the plaintiffs were minor any further construction carried out by the defendants would be entirely at their risk. Accordingly, the trial Court appointed a cadestral surveyor as the Commissioner. He was directed to prepare a map demarcating the property which was bequeathed to the plaintiffs by Sopanrao and the property conveyed under the agreement between Defendant Nos.6 and 1. Accordingly, on 11.7.2001, the Deputy Director, Land Records was directed to depute a cadestral surveyor to carry out the work of the Commissioner. The Deputy Director, Land Records submitted his report on 26.9.2001 which was not in consonance with the directions of this Court. The trial

Court, therefore, appointed another Commissioner who submitted his report. Certain clarifications were then sought by the trial Court from the Deputy Director, Land Records which were furnished by the latter. This report was rejected by the trial Court on 5.4.2002.

7. Appeal from Order was filed by the plaintiffs being Appeal from Order No.449 of 2002 which was disposed off on 2.8.2002. This Appeal from Order was directed against the same order which had been challenged by Defendant No.1 in Appeal from Order No.425 of 2001. Since the matter had already been remanded by the order of this Court on 29.6.2001, the same view was taken and the parties were directed to maintain status quo. After remand, the Commissioner had submitted his report on 8.3.2002 on the basis of this report. The plaintiffs filed an application for amendment of the plaint and another application for amendment of the application for interim injunction. These two applications were heard together and by a common order, the Civil Judge Senior Division, Pune rejected the applications. Aggrieved by these orders, the plaintiff preferred two Civil Revision Applications being C.R.A. Nos.881 of 2002 and 889 of 2002. These Civil Revision Applications were disposed off on 2.8.2002 by this Court directing the trial Court to decide whether the report given by the Commissioner is in consonance with the

order passed by this Court on 29.6.2001. The trial Court held that the report of the Commissioner could not be accepted as the properties which the Commissioner had delineated in accordance with the schedule to the will of Sopanrao were at variance with other documentary evidence on record. Therefore, the Commissioner's report was rejected by the trial Court by his order dated 29.8.2002. This order has been challenged in Writ Petition No.157 of 2003. The amendment applications were disallowed by a common order dated 23.9.2002 which have been challenged in Writ Petition Nos.154 of 2003 and 155 of 2003. The application for interim relief at Exhibit 5 was also dismissed by order dated 23.9.2002 which is challenged in Appeal from Order No.1028 of 2002.

8. The trial Court was of the view that the Commissioner's report could not be accepted as there was no evidence showing partition of the property between Trimbakrao and Sopanrao as claimed by the Plaintiffs. The trial Court found that the Commissioner had drawn maps showing the boundaries of the property as mentioned in the will of Sopanrao. The trial Court found that these boundaries were not in consonance with the recitals in the will whereby Sopanrao had stated that he was bequeathing the property in his possession to the plaintiffs. The trial Court rejected the Commissioner's

report dated 8.3.2002 and accepted the map prepared by Tehsildar, Pune, the competent authority, Urban Agglomeration, Pune dated 20.5.1978. Having rejected the Commissioner's report, the trial Court was of the view that the amendment applications which were filed in order to amend the plaint as per the Commissioner's Report were required to be rejected. The trial Court was of the view that if such applications for amendment to the plaint and the injunction application were allowed, it would mean that the identity of the suit property was being changed. The trial Court was of the view that the plaintiffs could not be permitted to amend their plaint by changing their claim in its totality.

9. The plaintiffs by the amendment as per the Commissioner's report sought to contend that the properties on Survey Nos.13 and 14 had been partitioned in the north-south direction rather than in the east-west direction. The plaintiffs claimed by amendment that if the properties are considered to have been partitioned in the north-south direction, they would be entitled to properties which Defendant No.6 had conveyed to Defendant No.1. According to the plaintiffs, these properties had in fact been willed out to them which was evident from the schedule to the will. The plaintiffs claimed that the schedule to the will was relevant to determine the actual bequest made to them by

Sopanrao. The trial Court by relying on other contemporaneous documents has found that the partition of the lands between Sopanrao and Tukaram was in the east-west direction and, therefore, Tukaram had conveyed only such property as was owned by him through Trimbakrao. Similarly, the four paternal aunts of Tukaram who had entered into individual agreements and had conveyed their lands which they were entitled to under the will of their father Trimbakrao would be left with no bequest if the amendment applications were allowed.

10. The issue, therefore, to be decided is whether the plaintiffs can be permitted to change the identity of the suit property when in the plaint they had claimed certain portion of the land bearing Survey Nos.13 and 14. Could it be said that the Commissioner’s report and the map drawn by him on the basis of the schedule to the will of Sopanrao were wrongly rejected by the trial Court? It is only if the Commissioner’s report is accepted, will the need arise for consequential amendments to be plaint and the injunction application. Having rejected the Commissioner’s report, the trial Court has rejected the amendment applications.

11. On a consideration of the application for temporary injunction at Exhibit 5, the trial Court has

found that the property which was being developed by Defendant No.1 was that which was conveyed to it by all the daughters of Trimbakrao and Tukaram. The trial Court relying on the applications made by Sopanrao and Tukaram before the Deputy Director, Land Records and other contemporaneous documents has found that the properties conveyed to Defendant No.1 were owned by Tukaram and his paternal aunts. The Plaintiffs had no right over these properties and, therefore, no injunction was granted.

12. Several submissions were made by all the respective Counsel appearing for the plaintiffs and the defendants. However, the main bone of contention is whether the property owned by the Plaintiff should be identified as per the schedule to the will of Sopanrao or as the one which was in possession of Sopanrao when he made the bequest.

13. In the plaint, the plaintiffs have described the property which they are claiming as Survey No.13/1+2+3 in Village Vadgaon Sheri Taluka Haveli, District Pune admeasuring 7 hectares and 69.4.50 ares, which is bounded to the east by Survey No.13 B/1+2+3, on the west it is bounded by Survey Nos.14 and 16, on the North-South, it is bounded by Survey No.13 B/1+2+3 and on the South by Mula Mutha river. In respect of the

property at Survey No.14, the plaintiffs have described it as the western half of the land bearing survey No.14 in the same village admeasuring about 8 hectares and 70.5 ares, bounded to the east by a portion of survey No.14 owned by Defendant No.6, on the west by Survey Nos.15 and 16. The plaintiffs have described this property to be bounded on the north by a portion of survey No.14 owned by Defendant No.6 and on the South by Mula Mutha river. The plaintiffs have claimed that there was an oral partition between Trimbakrao and his son Sopanrao in 1965 and accordingly the properties mentioned above were allotted to the share of Sopanrao and the other properties were held by Trimbakrao. The plaintiffs have claimed that Trimbakrao willed his properties to his four daughters and his grandson Tukaram; these properties were other than those which are mentioned above; the properties which are mentioned above were willed out by Sopanrao to the plaintiffs; The description of these properties is as per the boundaries mentioned in the will of Sopanrao. The 1965 partition between Trimbakrao and Sopanrao has not been accepted by the defendants nor has it prima facie been proved by the plaintiffs. The trial Court, therefore, rightly did not accept this contention of the plaintiff that the undivided property which was ancestral property in the hands of Trimbakrao had been partitioned during the lifetime of Trimbakrao in 1965 between himself and

Sopanrao.

14. An application was made in 1978 under the Urban Land Ceiling Act by Sopanrao and Tukaram claiming exemption under the Act. These applications do not support the claim made by the plaintiffs as Sopanrao's property has been shown to be south of both survey NOs.13 and 14. The revenue records also indicate that the property was partitioned only in 1970 between Tukaram and Sopanrao. The trial Court has considered all these aspects and has found that the preparation of a map based on the schedule to the will of Sopanrao would be imaginary since the other documents including the maps prepared under the Urban Land Ceiling Act indicated that the division of the property bearing Survey Nos.13 and 14 was east-west and not north-south. The plaintiffs were therefore, prima facie entitled to the southern half of the two survey numbers.

15. Permitting the plaintiffs to amend the plaint and the application for interim relief on the basis of the Commissioner's report would mean that their entire claim in the plaint was being changed. The identity of the land claimed in a suit cannot be changed by way of amendment. The admission on behalf of the plaintiffs that the will of Sopanrao was being rejected and, therefore, the title of the plaintiffs to the property

was being divided is fallacious. By rejecting the Commissioner's report, the trial Court has not rejected the title of the plaintiffs to the property. Nor has the will of Sopanrao been rejected. It is only the identity of the property which is sought to be made out in the amendment based on the Commissioner's report which has not been accepted by the trial Court. The plaintiffs themselves when called upon by the Commissioner to identify their lands were unable to identify the same. According to their advocate, it would be futile to ask the plaintiffs to identify the lands which were owned by and were in possession of Sopanrao as they were minors when Sopanrao expired.

16. In my view, the trial Court cannot be faulted for passing the impugned orders. Once the Commissioner's report is rejected the amendment applications based on the Report would have to be disallowed. The only question which would be required to be considered is whether the application at exhibit 5 should have been granted. While rejecting this application, the trial Court has found that the lands which the plaintiffs claimed had been bequeathed to them under the will were in fact lands which were owned by their father Tukaram, Defendant No.6 herein and the daughters of Trimbakrao. The trial Court has rightly found that if the land described by the plaintiffs is to

be considered as having been bequeathed to them by Sopanrao, it would mean that the paternal aunts of Tukaram would have no right to any property left to them by Trimbakrao. Admittedly each of them are entitled to two acres of land from the estate of Trimbakrao. The rest of Trimbakrao's estate was inherited by Tukaram under Trimbakrao's will. Therefore, the plaintiffs, prima facie, have no right over this property. Furthermore, what has been sold to Defendant No.1 by Tukaram and the other defendants was fallow land on which Defendant No.1 has already constructed residential buildings. Flats in some of these buildings have already been bought by third parties. In my view, therefore, it would not be proper to stall the development of these properties which had been conveyed to Defendant No.1 by Defendant Nos.6 to 20 when, prima facie, the plaintiffs have no right over this property.

17. Moreover, the trial Court has taken a prima facie view based on the material before it and, therefore, there is no need to interfere at this stage as it is a possible view. As held by the Supreme Court in the case of *Wander Ltd. v/s. Antox India* reported in **1990 (Supplementary) SCC 727**, interim orders passed under Order 39 Rule 1 are discretionary in nature and the appellate Court should not interfere with the exercise of this discretion and substitute its own

discretion except when the discretion is exercised arbitrarily or capriciously or perversely or where the Court has ignored the settled principles of law regulating the grant of interlocutory injunctions. In my view, the trial Court has exercised its discretion reasonably an in a judicious manner. I, therefore, see no reason to interfere with the order under Exhibit 5. I have already found that the view taken by the trial Court in rejecting the Commissioner's report cannot be faulted as it is a reasonable view and which does not warrant any interference under writ jurisdiction. The amendment applications arise only from the Commissioner's report and once the Commissioner's report has been rejected the question of allowing the amendment applications does not arise.

18. In my view, therefore, the trial Court has not committed any error by passing the impugned orders. The Appeal from Order and the Writ Petitions are, therefore, dismissed. No order as to costs.

19. Mr.Jamdar, appearing for Appellants/Petitioners, seeks stay of this order for a period of 10 weeks. Mr.Saraf opposes the same. The interim stay which has been granted earlier shall continue for a period of six weeks from today.

20. Certified copy expedited.